



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 271

[EPA-R06-RCRA-2021-0073; FRL-10021-64-Region 6]

#### Arkansas: Authorization of State Hazardous Waste Management Program Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The State of Arkansas Division of Environmental Quality (DEQ) has applied to the Environmental Protection Agency (EPA) for final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The EPA has reviewed Arkansas' application and has determined that these changes appear to satisfy all requirements needed to qualify for final authorization and is proposing to authorize the State's changes. The EPA is seeking public comment prior to taking final action.

**DATES:** Comments on this proposed rule must be received by **[insert date 30 days after date of publication in the *Federal Register*]**.

**ADDRESSES:** Submit your comments by one of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- *Email:* [patterson.alima@epa.gov](mailto:patterson.alima@epa.gov).

*Instructions:* EPA must receive your comments by **[insert date 30 days after date of publication in the *Federal Register*]**. Direct your comments to **Docket ID Number EPA-R06-RCRA-2021-0073**. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI), or other information whose disclosure is

restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <https://www.regulations.gov>, or email. The Federal *regulations.gov* website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment with any CD you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption and be free of any defects or viruses.

*Docket:* The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov). Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy.

You can view and copy Arkansas’s application and associated publicly available docket materials either through [www.regulations.gov](http://www.regulations.gov) at the following locations: Division of Environmental Quality, 5301 Northshore Drive North Little Rock, Arkansas, 72118 telephone: (501) 682-0744 and EPA, Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270. The EPA facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Alima Patterson, Regional Authorization/Codification Coordinator at (214) 665-8533, before visiting the Region 6 office. Interested persons wanting to examine these documents should make an appointment with the office.

**FOR FURTHER INFORMATION CONTACT:** Alima Patterson, (214) 665-8533, [patterson.alima@epa.gov](mailto:patterson.alima@epa.gov). Out of an abundance of caution for members of the public and our

staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID–19. We encourage the public to submit comments via <https://www.regulations.gov>, as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

## **SUPPLEMENTARY INFORMATION:**

### **A. Why Are Revisions to State Programs Necessary?**

States which have received final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask the EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

### **B. What decisions have EPA made in this Rule?**

On March 2, 2021, the State of Arkansas submitted a final complete program revision application seeking authorization of changes to its hazardous waste program that correspond to certain Federal rules promulgated between July 1, 2014 and June 30, 2018, which includes RCRA Clusters XXIV through and RCRA Cluster XXVI (Checklists 233A, 233B, 233C, 233D2, 233E, 234, 235, 236, 237, 238 and 239). The EPA has reviewed Arkansas' application to revise its authorized program and is proposing to find that it meets all of the statutory and regulatory requirements established by RCRA. Therefore, we propose to grant the State of Arkansas final authorization to operate its hazardous waste program with the changes described in the authorization application.

The State Arkansas will continue to have responsibility for permitting treatment, storage and

disposal facilities (TSDFs) within its borders (except in Indian Country), and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, the EPA will implement those requirements and prohibitions in the State of Arkansas, including issuing permits, until the State is granted authorization to do so.

**C. What is the effect of this proposed authorization decision?**

If the State of Arkansas is authorized for these changes, a facility in Arkansas subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. Additionally, such facilities will have to comply with any applicable Federal requirements such as, for example, HSWA regulations issued by the EPA for which the State has not received authorization. The State of Arkansas will continue to have enforcement responsibilities under its State hazardous waste program for violations of such program, but the EPA retains its authority under RCRA sections 3007, 3008, 3013 and 7003, which include, among others, authority to:

- conduct inspections and require monitoring, tests, analyses, or reports;
- enforce RCRA requirements and suspend or revoke permits, and
- take enforcement actions after notice to and consultation with the State.

The action to approve these provisions would not impose additional requirements on the regulated community because the regulations for which the State of Arkansas is requesting authorization are already effective under State law and are not changed by the act of authorization.

**D. What happens if the EPA receives comments on this action?**

If the EPA receives comments on this proposed action, we will address those comments in our final action. You may not have another opportunity to comment. If you wish to comment on

this proposed authorization, you must do so at this time.

**E. What has Arkansas previously been authorized?**

Arkansas initially received final authorization on January 11, 1985, effective January 25, 1985 (50 FR 1513), to implement its Base Hazardous Waste Management program. We granted authorization for changes to their program on August 23, 1985, via EPA letter, effective August 23, 1985; March 27, 1990 (55 FR 11192), effective May 29, 1990; September 18, 1991 (56 FR 47153), effective November 18, 1991; October 5, 1992 (57 FR 45721), effective December 4, 1992; October 12, 1993 (58 FR 52674), effective December 13, 1993; October 7, 1994 (59 FR 51115), effective December 21, 1994; June 20, 1995 (60 FR 32112), effective August 21, 1995; April 24, 2002 (67 FR 20038), effective June 24, 2002, as amended June 28, 2010 (75 FR 36538); August 15, 2007 (72 FR 45663), effective October 15, 2007, as amended June 28, 2010 (75 FR 36538); June 28, 2010 (75 FR 36538), effective August 27, 2010; August 10, 2012 (77 FR 47779), effective October 9, 2012; October 2, 2014 (79 FR 59438), effective December 1, 2014; October 31, 2014 (79 FR 64678), effective December 30, 2014; January 29, 2016 (81 FR 4961), effective March 29, 2016; August 11, 2016 (81 FR 53025), effective October 11, 2016; and September 14, 2017 (82 FR 43185), effective November 13, 2017.

The authorized Arkansas RCRA program was incorporated by reference into the Code of Federal Regulations October 12, 1993 (58 FR 52674) effective December 13, 1993; June 20, 1995 (60 FR 32112) effective August 21, 1995; June 28, 2010 (75 FR 36538) effective August 27, 2010; October 2, 2014 (79 FR 59438) effective December 1, 2014; January 29, 2016 (81 FR 4961) effective March 29, 2016; August 11, 2016 ( 81 FR 53025 ) effective October 11, 2016; and September 14, 2017 (82 FR 43185), effective November 13, 2017.

On March 2, 2021, Arkansas submitted a final complete program revision application seeking authorization of its program revision in accordance with 40 CFR 271.21. The State of Arkansas has undergone a state agency reorganization that has placed the Arkansas Department of Environmental Quality in the Arkansas Department of Energy and Environment and is now

the Arkansas Division of Environmental Quality (DEQ). The Arkansas Division of Environmental Quality is now the agency responsible for administering all solid and hazardous waste regulations for the State of Arkansas. The Arkansas Pollution Control and Ecology Commission (APC&EC) is vested with general authority to make and amend rules in Ark. Code Ann. § 8-01-203(b)(1)(A), and is vested with specific authority to make and amend rules with regard to hazardous waste management in Ark. Code Ann. § 8-7-209(b)(1).

On May 28, 2020, the APC&EC passed Minute Order No. 20-14 to initiate Rulemaking for amendments to Regulation 23, Hazardous Waste Management in order to adopt Federal regulations promulgated between through May 30, 2018. On June 6 and 7, 2020, the notice of the proposed regulation changes, public hearing, and public comment period was published in the Arkansas Democrat-Gazette. On July 20, 2020, at 2:00 p.m., the APC&EC held a public hearing regarding the proposed changes at 5301 Northshore Drive, North Little Rock, AR 72118. No public comments were received during the public hearing. The public comment period expired on August 3, 2020, and no public comments were received during the public comment period. The amendments to Regulation 23 further incorporated changes mandated by Act of March 5, 2019, No. 315 to change all references of “Regulation” to “Rule,” and changes in terminology to conform to the Transformation and Efficiencies Act of 2019, No. 910, as well as a variety of non-substantive and minor stylistic changes in the interest of clarity and consistency. The Arkansas Hazardous Waste Management Act of 1979, Ark. Code Ann. § 8-7-201 et seq., and the Arkansas Resource Reclamation Act of 1979, Ark. Code Ann. § 8-7-301 et seq. establish the statutory authority to administer the Hazardous waste management program under RCRA Subtitle C. The official State regulations may be found in Arkansas Pollution Control and Ecology Commission Rule No. 23 (Hazardous Waste Management), approved on August 27, 2020. The DEQ has the rules necessary to implement EPA’s portion of RCRA Clusters XXIV through RCRA Cluster XXVI. The provisions for which the State is seeking authorization are documented on Revision Checklists 233A, 233B, 233C, 233D2, 233E, 234, 235, 236, 237 238

and 239, which are portions of RCRA Clusters XXIV through RCRA Cluster XXVI. Any differences between the State's provisions and the Federal provisions are noted on the individual Revision Checklists and the Program Description submitted by the State to EPA as part of its program revision application package.

**F. What changes is EPA proposing to authorize with this action?**

On March 2, 2021, the State of Arkansas submitted a final complete program revision application, seeking authorization of their changes in accordance with 40 CFR 271.21. We have determined that the DEQ's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. We are now proposing to authorize, subject to receipt of written comments that oppose this action that the State of Arkansas hazardous waste program revisions are equivalent to, consistent with, and no less stringent than the Federal program, and therefore satisfy all of the requirements necessary to qualify for final authorization. The DEQ revisions consist of regulations which specifically govern Federal hazardous waste revisions promulgated between July 1, 2014 and June 30, 2018 (RCRA Clusters XXIV through RCRA Cluster XXVI). The Arkansas provisions are from the Arkansas Pollution Control and Ecology Commission (APC&EC) Rule No. 23, Hazardous Waste Management, as approved on August 27, 2020. In the State's adoption of the Federal provisions addressed by Checklist 233B, Arkansas incorrectly removed and reserved Rule 23 section 261.2(a)(2)(ii) (analogous to 40 CFR 261.2(a)(2)(i)(B)). EPA has notified Arkansas and the State will correct the error in their next rulemaking. We propose to grant Arkansas final authorization for the program changes in the Table within this document.

Description of Federal requirement (include Checklist No., if relevant)	Federal Register date and page (and/or RCRA statutory authority)	Analogous state authority
<b>RCRA Cluster XXIV</b>		
1. Revisions to the Definition of Solid Waste Changes affecting non-waste determinations and variances (Checklist 233A).	80 FR 1694, January 13, 2015, as amended on May 30, 2018, 83 FR 24664.	APC&EC Rule No. 23, Sections 260.31(c) introductory paragraph, 260.31(c)(1) – (5), 260.33(c) – (e), 260.42 introductory paragraph, 260.42(a)(1) – (10), 260.42(b).
2. Revisions to the Definition of Solid Waste – Legitimacy-related provisions. (Checklist 233B)	80 FR 1694, January 13, 2015, as amended on May 30, 2018, 83 FR 24664.	APC&EC Rule No. 23, Sections 260.10 “contained”, 260.10 “Hazardous secondary material”, 260.43(a) introductory paragraph, 260.43(a)(1) – (4), 260.43(b) introductory paragraph, 260.43(b)(1) – (2), 260.43(c), 261.2(b)(3) – (4), 261.2(g).
3. Revisions to the Definition of Solid Waste - Speculative Accumulation (Checklist 233C).	80 FR 1694 – 1814 January 13, 2015.	APC&EC Rule No. 23, Sections 261.1(c)(8).
4. Revisions to the Definition of Solid Waste – Exclusions and non-waste determinations. (Checklist 233D2)	80 FR 1694, January 13, 2015, as amended on May 30, 2018, 83 FR 24664.	APC&EC Rule No. 23, Sections 260.10 “Facility”, 260.10 “Hazardous secondary material generator”, 260.10 “Intermediate facility”, 260.10 “Land-based unit”, 260.10 “Transfer facility”, 260.30 introductory paragraph, 260.30(b) – (e), 260.30(f) removed, 260.34(a) – (c), 261.1(c)(4), 261.2(c)(3), 261.2(c)(4) Table 1, 261.4(a)(23) introductory paragraph, 261.4(a)(23)(a)(i)(A) – (C), 261.4(a)(23)(ii)(A) – (F), 261.4(a)(24) introductory paragraph, 261.4(a)(24)(i) – (v)(C)(2), 261.4(a)(24)(v)(C)(3), 261.4(a)(24)(v)(D) – (vii), 261.4(a)(25) introductory paragraph, 261.4(a)(25)(i) – (xii), 261 Subsection H, 261 Subsections K – L [Reserved], 261 Subsection M, 270.42 Appendix I, Items A(9) and A(10).  <i>Note: Section 261.4(a)(24)(v)(C)(3) is more stringent.</i>
5. Revisions to the Definition of Solid Waste – Remanufacturing exclusion (Checklist 233E)	80 FR 1694, January 13, 2015.	APC&EC Rule No. 23, Sections 260.10 “Remanufacturing”, 261.2(c)(3), 261.2(c)(4) Table 1, 261.4(a)(27) introductory paragraph, 261.4(a)(27)(i) – (vi)(F), 261 Subsections I, J, AA, BB, CC.

Description of Federal requirement (include Checklist No., if relevant)	Federal Register date and page (and/or RCRA statutory authority)	Analogous state authority
6. Response to Vacatur of the Comparable Fuels Rule and the Gasification Rule (Checklist 234)	80 FR 18777, April 8, 2015.	APC&EC Rule No. 23, Sections 260.10 “Gasification” [Removed], 261.4(a)(12)(i), 261.4(a)(16) [Reserved], 261.38 [Reserved].
7. Disposal of Coal Combustion Residuals from Electric Utilities (Checklist 235).	80 FR 21302, April 17, 2015.	APC&EC Rule No. 23, Sections 261.4(b)(4)(i) – (ii)(H).
<b>RCRA Cluster XXV</b>		
8. Import and Exports of Hazardous Waste (Checklist 236)	81 FR 85696, November 28, 2016. 82 FR 41015, August 29, 2017.	APC&EC Rule No. 23, Sections 260.10 “AES filing compliance date”, 260.10 “Electronic import-export reporting compliance date”, 260.10 “Recognized trader”, 260.11(g) introductory paragraph, 260.11(g)(1), 260.11(g)(2)[Reserved], 261.4(d)(1), 261.4(d)(4), 261.4(e)(1), 261.4(e)(4), 261.6(a)(3)(i) and 261.6(a)(5), 261.39(a)(5)(ii), 261.39(a)(5)(v) introductory paragraph, 261.39(a)(5)(v)(A) – (B)(2)(vii), 261.39(a)(5)(vi), 261.39(a)(5)(ix), 261.39(a)(5)(xi) <sup>1</sup> , 262.10(d), 262.12(d), 262.41(j), 262 Subsections E and F [Reserved], 262 Subsection H <sup>1</sup> , Appendix to Section 262 (removed by the final rule addressed by Checklist 237), 263.10(d), 263.20(a)(2), 263.20(c), 263.20(e)(2), 263.20(f)(2) and Note; 263.20(g) introductory paragraph, 263.20(g)(1) – (4)(ii), 264.12(a) introductory paragraph, 264.12(a)(1) - (a)(4)(ii), 264.71(a)(3) introductory paragraph, 264.71(a)(3)(i) – (ii), 264.71(d), 265.12(a) introductory paragraph, 265.12(a)(1) – (a)(4)(ii), 265.71(a)(3)

<sup>1</sup> Arkansas has not adopted the revisions to 40 CFR 261.39(a)(5)(xi) and 262.82(e)(1) and 262.82(e)(2) which were published on August 6, 2018 (83 FR 38262). EPA made conforming changes to the EPA office and address to which paper documents concerning imports and exports of hazardous waste and conditionally excluded cathode ray tubes must be sent. The change in address was needed to reflect the reorganization of hazardous waste import-export functions on April 29, 2018, from the Office of Federal Activities’ International Compliance Assurance Division, in EPA’s Office of Enforcement and Compliance Assurance, to the International Branch within the Office of Resource Conservation and Recovery’s Materials Recovery and Waste Management Division, in EPA’s Office of Land and Emergency Management. Because of the Federal government’s special role in matters of foreign policy, EPA cannot authorize States for import/export functions. However, EPA encourages States to incorporate these requirements into their regulations for the convenience of the regulated community and for completeness.

Description of Federal requirement (include Checklist No., if relevant)	Federal Register date and page (and/or RCRA statutory authority)	Analogous state authority
		introductory paragraph, 265.71(a)(3)(i) – (ii), 265.71(d), 266.70(b) introductory paragraph, 266.70(b)(1) – (3), 266.80(a) Table, 267.71(a)(4) – (a)(6)(ii), 267.71(d), 273.20, 273.39(a) – (b), 273.40, 273.56, 273.62(a), 273.70 introductory paragraph, 273.70(a) – (c).
9. Hazardous Waste Generator Improvements Rule (Checklist 237)	81 FR 86732, November 28, 2016	APC&EC Rule No. 23, Sections 260.10 “Acute hazardous waste”, 260.10 “Central accumulation area”, 260.10 “Large quantity generator”, 260.10 “Non-acute hazardous waste”, 260.10 “Performance Track member facility” [Removed], 260.10 “Small quantity generator”, 260.10 “Very small quantity generator”, 260.11(d)(1), 261.1(a)(1), 261.1(c)(6), 261.4(a)(7), 261.5 [Reserved], 261.6(c)(2)(iv), 261.33(e) introductory paragraph, 261.33(f) introductory paragraph, 261.420(g), 262.1 introductory paragraph, 262.1 “Condition for exemption”, 262.1 “Independent requirement”, 262.10(a) introductory paragraph, 262.10(a)(1) – (3), 262.10(b), 262.10(d), 262.10(g)(1) – (2), 262.10(j) [Reserved], 262.10(l) introductory paragraph, 262.10(l)(1) – (2), 262.11 introductory paragraph, 262.11(a) – (g), 262.12 [Reserved], 262.13 through 262.18(b), 262.18(c), 262.18(d) – (e), 262.19(b) – (d), 262.32(b) introductory paragraph, 262.32(b)(1) – (5), 262.32(c) – (d), 262.34 [Reserved], 262.35, 262.40(c), 262.41 introductory paragraph, 262.41(j), 262.43, 262.44 [Reserved], Subsections I and J [Reserved], 262.200 “Central accumulation area” [Removed], 262.200 “Trained professional”, 262.201(a) – (b), 262.202(a) – (b), 262.203(a) – (b)(2), 262.204(a), 262.206(b)(3)(iii), 262.207(d)(2), 262.208(a)(1) – (2), 262.208(d)(2) introductory paragraph, 262.208(d)(2)(i) – (ii), 262.209(b), 262.210(a), 262.210(b)(3), 262.210(d)(2), 262.211(c), 262.211(d), 262.211(e)(3), 262.212(d), 262.213(a)(1) – (3), 262.213(b)(2), 262.214(b)(5), 262.216(a) – (b), 262 Subsection L, 262 Subsection M, 263.12(a) – (b)(2), 264.1(g)(1),

Description of Federal requirement (include Checklist No., if relevant)	Federal Register date and page (and/or RCRA statutory authority)	Analogous state authority
		<p>264.1(g)(3), 264.15(b)(4), 264.15(b)(4) Comment [Removed], 264.71(c), 264.71(c) Comment [Removed], 264.75, 264.170, 264.170 Comment, 264.174, 264.191(a), 264.195(e) [Reserved], 264.1030(b)(2), 264.1050(b)(3), 264.1101(c)(4), 265.1(c)(5), 265.1(c)(7), 265.15(b)(4), 265.15(b)(5) [Removed], 265.71(c), 265.71(c) Comment [Removed], 265.75, 265.174, 265.174 Comment [Removed], 265.195(d) [Reserved], 265.201 [Reserved], 265.1030(b)(2), 265.1030(b)(3), 265.1050, 265.1101(c)(4), 266.80(a), 266.255(a), 267.71(c), 268.1(e)(1), 268.7(a)(5), 268.50(a)(1), 268.50(a)(i) introductory paragraph, 268.50(a)(2)(i)(A) – (D), 270.1(a)(3), 270.1(c)(2) introductory paragraph, 270.1(c)(2)(i) – (ii), 270.42(l) [Reserved], Item O.1 of 270.42 Appendix I [Reserved], 273.8(a)(2), 273.81(b), 279.10(b)(3).</p> <p><i>Note: The following provisions are more stringent: 261.6(c)(2)(iv), 262.18(c), 262.19(b) – (d), 262.41 introductory paragraph, 264.75, 264.191(a) and 265.75.</i></p>
<b>RCRA Cluster XXVI</b>		
10. Confidentiality Determinations for Hazardous Waste Export and Import Document. (Checklist 238).	83 FR 60894, December 26, 2017.	APC&EC Rule No. 23, Sections 260.2(b), 260.2(d)(1) – (2), 261.39(a)(5)(iv), 262.83(b)(5), 262.83(f)(9), 262.84(b)(4), 262.84(f)(8).
11. Hazardous Waste Electronic Manifest User Fee Rule. (Checklist 239)	83 FR 420, January 3, 2018.	APC&EC Rule No. 23, Sections 260.4, 260.5, 262.20(a)(1) – (2), 262.21(f)(5) – (8), 262.24(c) introductory paragraph, 262.24(c)(1) – (2), 262.24(e), 262.24(g) [Reserved], 262.24(h), 262 Appendix [Removed], 263.20(a)(9), 263.21(a) introductory paragraph, 263.21(a)(1) – (4), 263.21(b)(1) – (4), 263.21(c) introductory paragraph, 263.21(c)(1) – (2), 264.71(a)(2) introductory paragraph, 264.71(a)(2)(i) – (vi), 264.71(k) introductory paragraph, 264.71(k)(1) – (2), 264.71(m) introductory paragraph, 264.71(m)(1), 264.71(m)(2)

Description of Federal requirement (include Checklist No., if relevant)	Federal Register date and page (and/or RCRA statutory authority)	Analogous state authority
		introductory paragraph, 264.71(m)(2)(i) – (iii), 264.71(m)(3), 264.71(m)(3)(i) – (ii), 264.71(m)(4) – (5), 264.1086(c)(4)(i), 264.1086(d)(4)(i), 265.71(a)(2) introductory paragraph, 265.71(a)(2)(i) – (vi), 265.71(k) introductory paragraph, 265.71(k)(1) – (2), 265.71(m) introductory paragraph, 265.71(m)(1), 265.71(m)(2) introductory paragraph, 265.71(m)(2)(i) – (iii), 265.71(m)(3), 265.71(m)(3)(i) – (ii), 265.71(m)(4) – (5), 265.1087(c)(4)(i), 265.1087(d)(4)(i).

**G. Where are the revised State Rules different from the Federal Rules?**

*1. Evaluation and Analysis on When State Regulations are More Stringent or Broader in Scope than the Federal Regulations*

Under 40 CFR 271.1(i), EPA allows states to (1) adopt and enforce requirements which are more stringent or more extensive than those required by the federal RCRA program, and (2) operate a program with a greater scope of coverage than that required by the federal program. To determine whether particular state provisions are more stringent or broader in scope, EPA uses the December 23, 2014, guidance document: “Determining Whether State Hazardous Waste Requirements are More Stringent (MS) or Broader in Scope (BIS) than the Federal RCRA Program.”<sup>2</sup> In the guidance document, EPA uses a two-part test to determine if state regulations are MS or BIS. The two-part test requires that the following questions be answered sequentially:

- a. Does imposition of the particular state requirement increase the size of the regulated community or universe of wastes beyond what is covered by the federal program through either directly enforceable requirements or certain conditions for exclusion?
- b. Does the particular requirement under review have a counterpart in the federal regulatory program?

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<sup>2</sup> A copy of this guidance is included in the docket of this proposed rule.

If the answer to the first part of the test is yes, then the state requirement is generally considered broader in scope. If the answer is no, then EPA uses the second part of the test to determine whether the state requirement is more stringent or broader in scope. If the state requirement has a counterpart in the federal program, the state requirement is classified as more stringent. However, if the state requirement does not have a counterpart, it is classified as broader in scope.

State provisions that are broader in scope are not part of the federally authorized program and thus, are not federally enforceable.

## *2. Arkansas Requirements That Are Broader in Scope Than the Federal Program*

DEQ has adopted the Revisions to the Definition of Solid Waste (DSW) Rule published on January 13, 2015 (80 FR 1694), as amended by the DSW final rule published on May 30, 2018 (83 FR 24664) (2018 DSW rule). However, Arkansas has retained certain provisions from the federal 2015 DSW provisions that were vacated by the Court of Appeals for the District of Columbia Circuit, *Am. Petroleum Inst. v. EPA*, 862 F.3d 50 (DC Cir. 2017) and *Am. Petroleum Inst. v. EPA*, 883 F.3d 918 (DC Cir. 2018), and which have been removed from the federal regulations by the 2018 DSW Rule. The Court vacated certain aspects of the 2015 federal DSW rule and replaced them with provisions from the 2008 DSW rule, see 73 FR 64668 (October 30, 2008). Specifically, the Court (1) vacated the federal 2015 verified recycler exclusion for hazardous waste that is recycled off-site (except for certain provisions) (40 CFR 261.4(a)(24)) and the associated provisions at 40 CFR 260.30(f) and 260.31(d); (2) reinstated the transfer-based exclusion at 261.4(a)(24) and (25) from the 2008 rule to replace the now vacated 2015 verified recycler exclusion; (3) vacated Factor 4 of the 2015 definition of legitimate recycling in its entirety (40 CFR 260.43(a)(4)); and (4) at 40 CFR 260.43(b), reinstated the 2008 version of Factor 4 at 40 CFR 260.43(c)(2) to replace the now-vacated 2015 version of Factor 4.

In the State's adoption of the 2018 DSW rule, Arkansas has (1) retained the 2015 verified recycler exclusion by adopting an analog to 40 CFR 260.31(d), which addresses a variance from

classifying as a solid waste those secondary materials that are transferred for reclamation under 40 CFR 261.4(a)(24); (2) replaced the federal reference to “any person” in the introductory paragraph of 40 CFR 261.4(a)(24) with “verified reclamation facility”; and (3) adopted the vacated Factor 4 of the 2015 definition of legitimate recycling (260.43(a)(4)), as well as the 2015 DSW provision at 261.4(a)(23)(ii)(E)) which requires that documentation of the legitimacy determination must be a written description of how the recycling meets all four factors in § 260.43(a).

In order to determine whether the State of Arkansas regulations are more stringent or broader in scope than the federal RCRA program, EPA used the two-part test described in Section G.1. With respect to the first test, Arkansas regulates the same size of the regulated community and the same universe of hazardous secondary materials as the federal RCRA program. With respect to the second test, EPA has determined that the following State of Arkansas provisions from the 2015 federal DSW rule are broader in scope: (1) APC&CE Rule No. 23 sections 260.31(d) and the introductory paragraph of 261.4(a)(24) with respect to the verified recycler exclusion and (2) APC&CE Rule No. 23 section 260.43(a)(4) and the reference to the four factors at section 261.4(a)(23)(ii)(E) with respect to Factor 4 definition of legitimate recycling.

Due to the vacatur of certain 2015 federal DSW provisions and the reinstatement of 2008 federal DSW provisions, EPA’s regulations do not include the provisions that were vacated by the Court<sup>3</sup> Arkansas has adopted selected vacated provisions, including the vacated 2015 DSW Factor 4 in the definition of legitimate recycling of hazardous secondary material and the verified recycler exclusion.<sup>4</sup> As a result of the federal vacatur, the Arkansas provisions at Rule No. 23 sections 260.31(d), 260.43(a)(4), the reference to “four factors” in 261.4(a)(23)(ii)(E) and the reference to “verified reclamation facility” in the introductory paragraph of 261.4(a)(24) have no

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<sup>3</sup> EPA issued a final rule referred to as the Transfer Base Exclusion reflecting the Court’s ruling, see 83 FR 24664 (May 30, 2018).

<sup>4</sup> The *Federal Register* citation for the “2015 DSW rule” is 80 FR 1694, January 13, 2015, and for the “2008 DSW rule” is 73 FR 64668, October 30, 2008.

direct analogs in the federal regulations. EPA's December 23, 2014, guidance supports this conclusion. On page 6 of our December guidance, EPA provides that, "...if a state adopts a federal solid or hazardous waste exclusion, but adds additional conditions that must be met for the state exclusion to apply, those additional conditions would be considered outside the scope of the federal program and would not be part of the federally authorized program, although the entity would still be subject to federal enforcement regarding the part of the state regulations which track the federal conditions." Arkansas' program effectively contains additional conditions that must be met for the exclusion to apply. This makes the State's additional provisions broader in scope and not part of the federally authorized program, see 40 CFR part 271.1(i)(2).

The DEQ provisions that are broader in scope than the federal regulations are not part of the program being proposed to be authorized by this proposed action. EPA cannot enforce requirements that are broader in scope, although compliance with such provisions is required by DEQ law. For the purposes of RCRA section 3009, the Agency has determined that the broader in scope provisions are more protective/stricter, thus being within the State's authority to maintain them as part of the State's RCRA program. We make this determination due to the fact that the broader in scope provisions in DEQ's verified recycler exclusion require additional conditions to be met in order to qualify for the exclusion when compared to the reinstated transfer-based exclusion found in 83 FR 24664 (May 30, 2018).

### *3. Arkansas Requirements That Are More Stringent Than the Federal Program*

The Arkansas hazardous waste program that is proposed for authorization contains several provisions which are more stringent than the Federal RCRA program. The more stringent provisions will be recognized as a part of the Federally-authorized program and will be Federally enforceable. The specific more stringent provisions are noted in the chart above and in the State's authorization application, and include the following:

1. Arkansas' Rule No. 23 section 261.4(a)(24)(v)(C)(3) requires the generator's certification statement to include the type and quantity of hazardous secondary material in a shipment. The Federal rules do not require this information to be included in the generator's certification statement.

2. Arkansas is more stringent because the State requires annual reporting rather than Federal biennial reporting at the following citations:

a. Rule No. 23 section 261.6(c)(2)(iv) requires owners and operators of facilities that recycle materials without storing them before they are recycled to meet the annual reporting requirements at Rule No. 23 section 265.75, rather than the federal biennial reporting requirement at 40 CFR 265.75.

b. The introductory paragraph of Rule No. 23 section 262.41 requires that generators submit annual rather than biennial reports.

c. Rule No. 23 sections 264.75 and 265.75 require that an owner or operator of treatment, storage or disposal facility must submit annual rather than biennial reports.

3. Rule No. 23 section 264.191(a) restricts those engineers who can inspect or certify a tank system's integrity to those registered in Arkansas, and independent from the facility owner/operator. The Federal requirements allow registration in any State.

4. Rule No. 23 section 262.19(b) – (d) subject very small quantity generators to additional requirements not found in the Federal regulations. The additional requirements include the following:

a. Very small quantity generators must manifest hazardous waste in accordance with Rule 23, Section 262 Subsection B (Manifest Requirements Applicable to Small and Large Quantity Generators).

(b) Very small quantity generators must keep hazardous waste containers closed except when adding or removing waste.

(c) Very small quantity generators must keep hazardous waste containers in good condition. If a hazardous waste container is not in good condition, or if it begins to leak, the very small quantity generator must immediately transfer the hazardous waste from this container to a container that is in good condition, or immediately manage the waste in some other way that complies with this requirement.

#### *4. Arkansas Requirements That Are Broader in Scope Than the Federal Program*

In Rule 23, section 262.19(a) of the hazardous waste program that is proposed for authorization, Arkansas requires all generators to use a transporter that is permitted by the Arkansas Department of Transportation for the transportation of hazardous waste. The Arkansas provision is broader in scope because the Federal program does include transporter permits. EPA cannot enforce State requirements that are broader in scope, although compliance with such provisions is required by DEQ law.

### **H. Who handles permits after the authorization takes effect?**

The State of Arkansas will issue permits for all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to administer any RCRA hazardous waste permits or portions of permits which we issued prior to the effective date of this authorization. EPA will not issue any more new permits or new portions of permits for the provisions listed in Table 1 in this document after the effective date of this authorization. The EPA will continue to implement and issue permits for HSWA requirements for which Arkansas is not yet authorized.

### **I. How does this action affect Indian Country (18 U.S.C.1151) in Arkansas?**

Arkansas is not authorized to carry out its Hazardous Waste Program in Indian Country within the State. This authority remains with EPA. Therefore, this action has no effect in Indian Country.

### **J. What is codification and is the EPA codifying Arkansas' hazardous waste program as**

### **authorized in this rule?**

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the CFR. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272, subpart E for this authorization of Arkansas' program changes until a later date. In this authorization application the EPA is not codifying the rules documented in this ***Federal Register*** notice.

### **K. Administrative Requirements**

The Office of Management and Budget (OMB) has exempted this action (RCRA State Authorization) from the requirements of Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Therefore, this action is not subject to review by OMB. This action proposes to authorize State requirements for the purpose of RCRA 3006, and imposes no additional requirements beyond those imposed by State law. Accordingly, this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this action proposed to authorize preexisting requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). For the same reason, this proposed action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to authorize State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power

and responsibilities established by RCRA.

This proposed action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This proposed rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), the EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a State authorization application; to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the “Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings” issued under the Executive Order. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-

income populations in the United States. Because this rule proposed to authorize pre-existing State rules which are at least equivalent to, and no less stringent than existing federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, the proposed rule is not subject to Executive Order 12898.

**List of Subjects in 40 CFR Parts 271**

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

**Authority:** This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: June 4, 2021.

**David Gray,**

*Acting Regional Administrator, Region 6.*

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